United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANTS AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,248

DAVID LAWRENCE
and
ALBERT P. DICKER,

Appellants,

vs.

HAMILTON PROPERTIES, INC.
and
HARRY GALLOWAY,

Appellees.

Appeal from the United States District Court
for the District of Columbia

SHELDON E. BERNSTEIN
PAUL H. MANNES

1725 Eye Street N. W.
Washington 6, D. C.

Attorneys for Appellants

QUESTIONS PRESENTED

A complaint, charging appellees with defaming appellants by knowingly causing to be published in the Washington Post and Times Herald with malicious intent a false report that plaintiffs had not purchased the Raleigh Hotel, was dismissed by the District Court without opinion. The questions presented are:

1. Whether appellants' complaint stated a claim upon which relief can be granted?

2. Whether it is defamatory for the corporate appellees, who were purchasers from appellants of the Raleigh Hotel, and for Galloway, local manager for the corporate appellee, knowingly and with malicious intent, to say falsely of David Lawrence and Albert P. Dicker that they had not purchased the Raleigh Hotel, which was a major and prestigious transaction for them to have accomplished?

3. Whether appellants' complaint, which pleaded special damages generally, was deficient in failing to state specifically items of special damage?

4. Whether the court below erred in failing to grant appellants' request for leave to amend the complaint to conform to the facts?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,248

DAVID LAWRENCE, et al.,

Appellants,

vs.

HAMILTON PROPERTIES, INC., et al.,

Appellees.

Appeal From The United States District Court
for the District of Columbia

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

This is an appeal from the United States District Court for the District of Columbia in an action alleging that appellees caused the publication in the Washington Post and Times Herald of an article defaming appellants. [1] This appeal is from a judgment entered September 18,

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[1] Hereafter appellants and appellees will be referred to as below — plaintiffs and defendants.

1963, granting defendants' motions to dismiss the complaint. Notice of appeal was filed October 16, 1963. Jurisdiction of this appeal is granted by 28 U.S.C. §1291.

STATEMENT OF THE CASE

Defendants caused to be published in the Washington Post and Times Herald on May 17, and 18, 1963, an article stating that reports that plaintiffs had purchased the Raleigh Hotel were completely false. Plaintiffs further charged in the complaint that the publication was made maliciously with intent to injure plaintiffs' business reputation and means of livelihood within the real estate community of which they formed a part. (J.A. 1-4)

Defendants knew that the publication was false as plaintiffs had in fact purchased the Raleigh Hotel and then resold it to the defendant Hamilton Properties, Inc., prior to the date of the publication of the defamation. The defendant Galloway was the local manager for Hamilton Properties, Inc., at the time of the transaction. (J.A. 4)

Defendants moved to dismiss the complaint on the grounds that the complaint failed to state a claim upon which relief can be granted, that the publication complained of was not in fact defamatory, and that the complaint was insufficient because of plaintiffs' failure to plead specifically the items of special damage claimed. (J.A. 5 and 6)

The plaintiffs' opposition to the motions to dismiss amplified the extrinsic facts upon which they relied to make the complaint actionable. (J.A. 7 and 10) In the light of such allegations, it should have been readily apparent to the Court below that, if it did not consider that the complaint as filed was adequate, the complaint could readily have been amended to include any 'evidentiary' allegations the Court may have considered necessary. However, the Court below, without opinion, granted defendants' motions to dismiss the complaint and did not grant plaintiffs' request for leave to amend their complaint. (J.A. 11 and 12)

STATEMENT OF POINTS

1. It was libelous for defendants to cause to be published in the Washington Post and Times Herald a false report stating that reports that Albert P. Dicker and David Lawrence had purchased the Raleigh Hotel were absolutely false.

2. It was not necessary for plaintiffs in order to maintain a cause of action upon the aforesaid publication to plead and prove special damages with particularity.

3. Plaintiffs' complaint stated a cause of action, and if it did not, the Court below erred in failing to grant plaintiffs leave to amend.

SUMMARY OF ARGUMENT

Inasmuch as the Court below took this matter under advisement and did not publish any memorandum to accompany its ruling, appellants must guess the actual basis for its dismissal of the action. Because of the manner of the Court's ruling, it would seem logical to assume that the Court's ruling was based upon one of the points raised by defendants. This argument is framed so as to show the error in each point relied upon by defendants in support of their motions to dismiss. If, however, plaintiffs' complaint was not pleaded correctly, and the Court below dismissed the action on that basis, then the Court erred in not permitting plaintiffs to amend their complaint.

1. The complaint was sufficient because, under the circumstances, it was defamatory to say of David Lawrence and Albert P. Dicker that reports that they had purchased the Raleigh Hotel were absolutely false. The corporate defendant was the purchaser of the property from the plaintiffs and Galloway was its local manager. The defendants, therefore, knew that their statement was false and necessarily they must have been motivated by malice. This statement must be regarded in its proper frame of reference wherein these plaintiffs are known within a small but important segment of the community to have published reports concerning

their purchase of the Raleigh and resale to the corporate defendant. Viewed in such a light, the publication takes on the meaning defendants maliciously intended, namely, that plaintiffs were dishonest and were circulating vastly inflated stories concerning the extent of their real estate trading activities.

2. The other basis for defendants' motions was that plaintiffs did not plead special damage with requisite specificity. This defense attributes to an action in libel the more stringent standard of pleading applicable to slander. Even if this complaint were considered an action in slander, the alleged publication would still be actionable without proof of special damage, as it touched plaintiffs in their means of livelihood, tending to injure them in their trade or business.

3. Prior to the entry by the Court of its order of dismissal, plaintiffs requested leave to amend the complaint. The Court did not grant this request which should have been granted as a matter of right. In Cassell v. Michaux, 99 U.S. App. D.C. 375, 240 F. 2d 406, this Court held that "if the complaint contained only one claim, the right to amend once as of course prior to a responsive pleading, would be terminated by a judgment of dismissal." In the case at bar as in Cassell, no responsive pleadings have been filed. In Cassell, this Court reversed on the grounds that the Court below did not comply with the requirement of Rule 15(a) of the Federal Rules of Civil Procedure "that leave to amend must be 'freely given when justice so requires.'" The same rule is applicable in the case at bar.

ARGUMENT

In dismissing plaintiffs' complaint without stating anything more than the fact that the complaint was dismissed, the Court below left plaintiffs in the unenviable position of jousting with a will-o'-the-wisp. To compound plaintiffs' difficulty, the Court below in dismissing the action without granting leave to amend impliedly ruled that under no circumstance could plaintiffs state a valid cause of action utilizing the

facts of this case. Otherwise, the Court below, certainly under the modern concept of notice pleading, abused its discretion in failing to permit plaintiffs at least one amendment prior to the filing of a responsive pleading.

Plaintiffs will address themselves to the specific defenses raised by defendants below, upon one or all of which the Court possibly based its ruling.

I

Under All the Facts and Circumstances, the Court Below Erred in Ruling It Is Not Defamatory to Say Falsely and Maliciously of Albert P. Dicker and David Lawrence That Reports That They Had Purchased the Raleigh Hotel Were Completely False

Plaintiffs were and are active real estate traders engaged in the purchase and sale of commercial real estate largely in the Washington Metropolitan Area. Within the real estate community, plaintiffs were known as individuals engaged in major transactions. Because of their standing and reputation, other individuals would seek them out, and would listen seriously to business proposals made by plaintiffs. One of plaintiffs' major accomplishments, which they themselves had widely publicized, was their purchase and resale of the Raleigh Hotel. Among this small but important segment of the community, plaintiffs had discussed this transaction as evidence of their ability to conclude substantial transactions. Defendants' publication to this real estate community followed upon the heels of plaintiffs' statements. Defendants' publication did, as was intended, show to individuals with whom plaintiffs had discussed their transactions, that plaintiffs were not important and responsible traders and were not the type of individuals who might be considered in planning future transactions. The natural, probable and calculated consequence of defendants' publication was the impairment of plaintiffs' reputation in the real estate community resulting in the unwillingness of those persons who read the publication to transact business with them.

Unquestionably the offending publication prejudiced the plaintiffs in their trade. It touched upon their means of livelihood as real estate traders, and it would follow that other members of the real estate community would shun them as plaintiffs had been shown to have made extravangantly false claims. In a slander case dealing with this very problem, this Court dismissed defendants' contention that such a publication was not defamatory when it stated:

> "It is elementary in the law of libel and slander, that 'defamatory words falsely spoken of a party which prejudice such party in his or her profession or trade,' are actionable per se. Pollard v. Lyon, 91 U.S. 225. This form of action is allowed by the law for the protection of every man who follows an honest profession, business, or calling from false accusation, the natural tendency of which is to prejudice him in such profession, business, or calling. When, therefore, words are spoken which convey an imputation upon one in the way of his profession, business, or calling, or, as it is sometimes stated, which touch him therein, recovery may be had without allegation or proof of special damage." Marino v. DiMarco, 41 App. D.C. 76, 77 (1913)

Furthermore, the fact that the true meaning of the libel would be known to a small number of people — only those following the real estate market — does not serve to absolve defendants. Peck v. Tribune Co., 214 U.S. 189 (1909) is in point. Plaintiff sued for libel on the ground that defendant published an advertisement depicting plaintiff as a nurse who praised Duffy's Malt Whiskey. Speaking for a unanimous Court in reversing the affirmance of a directed verdict for defendant, Mr. Justice Holmes said that although "there was no general consensus of opinion that to drink whiskey is wrong or that to be a nurse is discreditable" and "very possibly giving a certificate and the use of one's portrait in aid of an advertisement would be regarded with irony, or a stronger feeling, only by a few. . . . such inquiries are beside the point. . . . an unprivileged falsehood need not entail universal hatred to constitute a cause of action. No falsehood is thought about or even known by all the world. No conduct is hated by all. . . . It seems to us impossible to say

that the obvious tendency of what is imputed to the plaintiff by this advertisement is not seriously to hurt her standing with a considerable and respectable class in the community. Therefore it was the plaintiff's right to prove her case and go to the jury, and the defendant would have got all that it could ask if [it] had been permitted to persuade them, if it could, to take a contrary view." 214 U.S. at 189-90.

Perhaps the framers of the Restatement of Torts had in mind just such a case as that at hand when they wrote:

> "§559 DEFAMATORY COMMUNICATION DEFINED
> A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."

II

The Court Below Erred in Requiring Plaintiffs To Plead Special Damages With Particularity — Rule 9(g) Does Not Alter the Common Law

The Court below erred if it dismissed the complaint because of plaintiffs' failure to plead special damages with particularity. The adoption of the Federal Rules did not cause a marriage of the law of libel and slander, and the requirement of pleading special damages remains applicable to slander only.

Under the Common Law, all libel is actionable. Moreover, the law of libel is still quite separate and distinct from the law of slander. This is perfectly understandable when considered in the light of the historical development of both. As Professor Plucknett points out:

> "As we have seen, the law of slander operated very capriciously, and it is natural that more enlightened judges should try to amend it, or, failing that, to use their new jurisdiction in 'libel' to mitigate its defects. Holt, Hale and Twisden tried to establish a rational rule that 'words should stand on their own feet' and be deemed to have the meaning which bystanders would naturally give them, but were unsuccessful. Partial relief came from

> the fact that the law of libel was not encumbered with the mitior sensus rule, and was also free from the requirement of special damage. It therefore only remained to find some way which would bring cases out of the category of common law slander into the category of libel. As early as 1670 Hale allowed an action on words which were too vague to be a common law slander, because in this case the words were written. He took the view that many defamatory words spoken in heat could be safely ignored, but if they were written, then the obvious presence of malice would make them actionable, and actionable without special damage. The law of libel was thus used to supplement the law of slander. But as in so many other cases, the law was ready to admit a novelty, but reluctant to abolish an anachronism. The newer and more rational law of libel was welcomed gladly in cases of written defamation, but the mitior sensus rule and the rules about words actionable per se, and words actionable on special damage, remained in force if the defamation was by speech only. The distinction between spoken and written defamation therefore became vital, and has proved to be permanent." Plunknett, A Concise History of the Common Law, 5th edition, 496-497 (1956).

See, Ratcliffe v. Evans [1892] 2 Q.B. 524, 529-30.

Defendants seem to urge that in some manner the adoption of the Federal Rules caused the special damage requirement of slander to be applied to libel. Accordingly, they say, special damage must be pleaded and proved in libel except in cases involving words charging a criminal offense involving moral turpitude, words charging infection with a contagious disease, or words prejudicial in a pecuniary sense to a person in office or to a person engaged as a livelihood in a profession or trade. Cf. Pollard v. Lyon, 91 U.S. 225, 227 (1876); Meyerson v. Hurlbut, 68 App. D.C. 360, 361, 98 F.2d 232, 233, cert. den., 305 U.S. 610 (1938). This is not the law. As Mr. Justice Clifford carefully pointed out, "it must be borne in mind that there is a marked distinction between slander and libel, and that many things are actionable when written or printed and published which would not be actionable if merely spoken, without averring and proving special damage." 91 U.S. at 228. Defendants can find no authority for the proposition that the limitations on slander have been extended so as to be made applicable to libel. Thus, if the Court

below based its ruling upon defendants' contention that libel not actionable per se requires proof of special damage, it was in error.

III

The Court Below Erred in Refusing To Permit Plaintiffs To Amend their Complaint

Assuming that the facts and circumstances complained of made up a cause of action, it was error for the Court below to refuse to give plaintiffs leave to amend their complaint--leave which should have been freely given.

Plaintiffs had an absolute right to amend their complaint once as a matter of course at any time prior to the judgment of dismissal. Rule 15(a), Federal Rules of Civil Procedure. This absolute right is terminated by a judgment of dismissal. Cassell v. Michaux 99 U.S. App. D.C. 375, 377, 240 F. 2d 406, 408 (1956); United States v. Newbury Mfg. Co., 123 F. 2d 453 (1st Cir. 1941). Thus the Court impliedly ruled that after consideration of the facts alleged in the complaint and amplified in plaintiffs' memoranda, in its opinion the plaintiffs could not possibly state a cause of action, and therefore, no useful purpose would be served in permitting plaintiffs to amend. In this regard, the Court below may have relied upon this Court's holding in Laughlin v. Garnett, 78 U.S. App. D.C. 194, 138 F. 2d 931 (1943) to the effect that the Court may deny further amendment at some time. However, in Laughlin leave to amend was denied after four unsuccessful attempts to set out a cause of action. It is submitted that Rule 15 dictates at least one opportunity to amend, and the Court's failure to permit at least one amendment to correct the 'defect' if any, was an abuse of discretion subject to review.

CONCLUSION

For the foregoing reasons, appellants submit that the order and judgment of the District Court should be reversed, and that this Court should remand the case for trial on the merits.

Respectfully submitted,

SHELDON E. BERNSTEIN

PAUL H. MANNES

1725 Eye Street, N.W.
Washington 6, D.C.

Attorneys for Appellants

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JOINT APPENDIX

[Filed June 18, 1963]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division

DAVID LAWRENCE
70 Greenway Terrace
Forest Hills, New York

ALBERT P. DICKER
7400 Glenbrook Road
Bethesda, Maryland

Plaintiffs

v.

HAMILTON PROPERTIES, INC.,
a corporation
360 Lexington Avenue
New York, New York

Serve: UNITED STATES
CORPORATION CO.
National Press Building
1346 F Street, N.W.
Washington, D. C.
Registered Agent

HARRY GALLOWAY
c/o Raleigh Hotel
12th and Pennsylvania Avenue, N.W.
Washington, D. C.

Defendants

Civil Action No. 1558-63

COMPLAINT
(Defamation)

1. The claims of the plaintiffs Albert P. Dicker and David Lawrence against the defendants Hamilton Properties, Inc., a corporation, and Harry Galloway are each for an amount in excess of $10,000.00, exclusive of interest and costs, and are within the jurisdiction of this Court.

2. On or about May 17, 1963, and May 18, 1963, the defendants, and each of them, uttered and caused to be published in the Washington Post and Times Herald, a daily newspaper of general circulation printed in the District of Columbia, an article which contained the following matter:

> "The Raleigh Hotel has been sold to four Washington men and it is 'almost definite' that it will be razed and replaced with an office building according to a spokesman for the group.
>
> "Jerry Wolman, who has formed a partnership with Sidney Teplin, Stanley Reines and Earl Foreman for the purchase, said the price was around $4 million, or $130 a square foot.
>
> "The syndicate hopes to replace the hotel at 12th and Pennsylvania ave., nw., with a building costing about $15 million and providing $400,000 square feet of office space, Wolman said.
>
> "Construction should start within six months, he said.
>
> "The proposed office building would be about 13 stories high and would be designed by architect Edmund W. Dreyfuss 'in accordance with what the President's trying to do for Pennsylvania Avenue,' Wolman said.
>
> "There is a possibility the Government would be among the tenants of the new building, he said.
>
> "Wolman said James Saulkeld and Frank Luchs of Shannon and Luchs Co., realtors, were agents in the sale, which took place about a month ago.
>
> "This is the second major downtown purchase announced by Wolman in the last four months. In February he reported that he, Reines and Toplin had bought the National Theater Building and the adjacent Munsey Building between 13th and 14th on E st. nw. for more than $5 million.
>
> "Those two buildings face on Pennsylvania ave. across Pulaski Park.
>
> "Officials of Hamilton Properties, Inc., 360 Lexington ave., New York City, owners of the Raleigh, could

not be reached last night for confirmation of the hotel's sale.

"The manager of the hotel, Harry Galloway, said he was not in a position to confirm or deny the sale. though he knew negotiations had been going on.

"He said the Raleigh has averaged about 70 percent occupancy for its 400 rooms. Despite a decline in downtown hotels caused by the competition of new properties, he said, the Raleigh has been a consistently profitable operation.

"The hotel was bought by Hamilton Properties, Inc., on May 25, 1962, from the Massaglia hotel chain, which had owned it since 1953.

"Reports that Albert P. Dicker of Washington and David Lawrence of New York City had bought the hotel earlier in 1962 were 'completely false', Galloway said."

3. The matter so uttered and caused by defendants to be uttered and published is untrue, false and defamatory in its references to the plaintiffs.

4. At the time of the utterance and publication complained of the defendant Harry Galloway was the agent and representative of the defendant Hamilton Properties, Inc., and was at all times material to this action acting at the direction of and with the approval and knowledge of the corporate defendant.

5. The defendants did falsely and maliciously and with intent to injure the plaintiffs, and wickedly, recklessly and wantonly in disregard of the truth or falsity of the uttered and printed matter hereinbefore set forth, and knowing said matter to be false, did utter and cause to be published and publish the aforesaid defamation.

6. As a result of the aforesaid utterance and publication the plaintiffs Albert P. Dicker and David Lawrence were caused great pain and mental anguish and the aforesaid publication did injure their good

names, professional and business reputations and fame, and did hold them up to scorn, ridicule, contempt and disgrace. Further, said publication maligned and prejudiced the plaintiffs and otherwise injured them in the performance of their occupation and means of livelihood and impaired their standing in the real estate community of which they form a part. Said publication did further cause them to lose opportunities to participate in business ventures because their good name in the real estate community had been impaired thereby.

7. Plaintiffs further aver and complain that by reason of the aforesaid they have been damaged in the sum of $400,000.00 actual damage and that by reason of the wanton and malicious acts and conduct of both defendants herein, as above set out, defendants should be required to pay, in addition to the actual damages, punitive damages in the sum of $1,000,000.00.

WHEREFORE, the plaintiffs demand judgment against the defendants Hamilton Properties, Inc., and Harry Galloway, and each of them in the sum of One Million, Four Hundred Thousand ($1,400,000.00) Dollars, besides interest and costs.

BERNSTEIN, KLEINFELD & ALPER

By /s/ Sheldon E. Bernstein

DEMAND FOR JURY TRIAL

Plaintiffs demand trial by jury on all issues herein.

/s/ Sheldon E. Bernstein

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID LAWRENCE, et al., *Plaintiffs*	:	
v.	:	Civil Action
HAMILTON PROPERTIES, INC., a corporation, 360 Lexington Avenue New York, New York, et al., *Defendants*	:	No. 1558-63

MOTION TO DISMISS

Defendant Hamilton Properties, Inc. moves the Court as follows:

1. To dismiss the action because the complaint fails to state a claim upon which relief can be granted.

2. To dismiss the action for failure of plaintiffs to comply with the Federal Rules of Civil Procedure.

The grounds for this motion, as set forth more fully in the accompanying memorandum of points and authorities, are (1) that the matter alleged in the complaint to be defamatory is not defamatory and (2) that the complaint fails to state specifically the items of special damage claimed.

Respectfully submitted,

SHER, OPPENHEIMER & HARRIS

By /s/Abraham J. Harris

1026 Woodward Building
Washington 5, D. C.

Attorneys for Defendant
Hamilton Properties, Inc.

[Certificate of Service]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID LAWRENCE
70 Greenway Terrace
Forest Hills, New York

ALBERT P. DICKER
7400 Glenbrook Road
Bethesda, Maryland,
Plaintiffs

vs.

HAMILTON PROPERTIES, INC.,
360 Lexington Avenue
New York, New York

HARRY GALLOWAY
Gramercy Inn
Rhode Island Avenue at Scott Circle
Washington, D. C.,
Defendants.

Civil Action No. 1558-63

MOTION TO DISMISS

COMES NOW Harry Galloway, by and through his attorneys, Reasoner & Davis, and moves this Honorable Court to dismiss the instant action, in that plaintiffs fail to state a claim against this defendant upon which relief can be granted, for the reasons that the matter alleged in the Complaint to be defamatory is not actionable per se and that the Complaint fails to state specifically the items of special damage claimed.

REASONER & DAVIS

By /s/ South Trimble, III
/s/ Thomas D. Quinn, Jr.
Attorneys for Defendant, Harry Galloway

505 Transportation Building
Washington 6, D. C.

[Filed July 18, 1963]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID LAWRENCE, et al., *Plaintiffs,*	:	Civil Action
v.	:	No. 1558-63
HAMILTON PROPERTIES, INC., et al., *Defendants.*	:	

OBJECTION TO MOTION TO DISMISS

The twin grounds of the Motion to Dismiss are (1) that the matter alleged in the complaint is not defamatory and (2) that the absence of an allegation of special damage makes the complaint deficient.

With respect to the first ground for the motion, clearly the allegations of the complaint taken together recite a cause of action for defamation, for they in substance allege that the plaintiffs, engaged in the purchase and sale of commercial real estate, were falsely reported to have purchased and resold the Raleigh Hotel. This detracted from their standing in the real estate community. Proof of these allegations would show that as a result of the alleged defamation, the real estate community would conclude plaintiffs were causing false reports to be circulated building up and touting their stature as real estate traders, and that therefore they were not active traders and not the type of persons with whom other real estate buyers and sellers might be willing to deal and/or that they were the type of person as to whom other persons active in the real estate community should assume to be of lesser stature and of lesser reliability than is properly the case. In short, the allegations and proof would establish that the ability of the plaintiffs to participate or become engaged in transactions of the real estate community were, by reason of the aforesaid impairment of their reputation, itself or themselves impaired. This type of reference clearly is within a well-recognized concept of defamation tending to injure persons in their trade, office,

business, occupation or profession. Meyerson v. Hurlbut, 68 App. D.C. 360, 98 F. 2d 232, cert. den. 305 U.S. 610 (1938); Marino v. DiMarco, 41 App. D.C. 76 (1913).

The other branch of defendant's motion, that damage must be alleged and proved, would be sound were this an action for slander not tending to injure plaintiffs in their trade or business. And similarly the authorities cited would support defendant's proposition in that context. However, what the defendant has failed to appreciate is that because it has caused the defamatory publication in the Washington Post — which on Motion to Dismiss must be assumed — the burden of the complaint is necessarily one for libel and as such special damage need not be alleged or proved.

In fact this so appears even from Moore's Federal Practice relied upon by defendant. The entire pertinent text from which the limited quotation employed by defendant was lifted reads:

> "From an act complained of a cause of action may arise, regardless of whether there has been special damage. Thus a statement of a trespass, breach of contract, or slander per se shows a cause of action, regardless of whether or not special damage has ensued. On the other hand, if words are not slanderous per se no cause of action can be stated without alleging special damage; and there is some tendency to hold that matter may become libelous where special damage is alleged, although the more general rule is that if the printed or written matter is defamatory it is actionable without regard to special damage. Where special damage must be alleged before a cause of action can be stated the courts require a good deal of particularity, especially in the slander and libel cases: the complaint must set forth precisely in what way the special damage resulted from the spoken or written words; it is not sufficient to allege generally that the plaintiff has suffered special damages, or that the party has been put to great costs and expenses." 2 Moore's Federal Practice, ¶9.08, 1922-23."

Thus, even defendant's authority in fact stands for the proposition that special damages need not be pleaded where printed matter is defamatory. Other authorities are to the same effect. Curtis Publishing Co. v. Vaughan, 107 U.S. App. D.C. 343, 347, 278 F. 2d 23, 27 (1960); Gariepy v. Pearson, 92 U.S. App. D. C. 337, 207 F. 2d 15, cert. den., 346 U.S. 909 (1953).

Furthermore, the cases cited by defendant do not support its contentions. Pollard v. Lyon, 91 U.S. 225 (1876) was an action for slander. Fowler v. Curtis Publishing Co., 86 U.S. App. D.C. 349, 182 F. 2d 377 (1950) was an action for disparagement of property, an altogether distinct action. In Schoen v. Washington Post, 100 U.S. App. D.C. 389, 390, 246 F. 2d 670, 671 (1957), the court painstakingly pointed out that the matter of the necessity of alleging special damages was not before it.

Citing Pollard v. Lyon, our Court of Appeals succinctly dealt with defendant's contention many years ago.

> "It is elementary in the law of libel and slander, that 'defamatory words falsely spoken of a party which prejudice such party in his or her profession or trade,' are actionable per se. Pollard v. Lyon, 91 U.S. 225. This form of action is allowed by the law for the protection of every man who follows an honest profession, business, or calling from false accusation, the natural tendency of which is to prejudice him in such profession, business, or calling. When, therefore, words are spoken which convey an imputation upon one in the way of his profession, business, or calling, or, as it is sometimes stated, which touch him therein, recovery may be had without allegation or proof of special damage." Marino v. DiMarco, 41 App. D.C. 76, 77 (1913)

For the foregoing reasons, the Motion to Dismiss should be denied.

Respectfully submitted,

BERNSTEIN, KLEINFELD & ALPER

By /s/ Sheldon E. Bernstein

[Certificate of Service]

[Filed August 22, 1963]

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID LAWRENCE and ALBERT P. DICKER, *Plaintiffs,*	:	
v.	:	Civil Action No. 1558-63
HAMILTON PROPERTIES, INC. and HARRY GALLOWAY, *Defendants.*	:	

OPPOSITION TO MOTION TO DISMISS FILED BY
DEFENDANT HARRY GALLOWAY

1. Plaintiffs respectfully refer the Court to their opposition to the motion to dismiss filed by the corporate defendant, Hamilton Properties, Inc., which opposition is incorporated herein by reference, and which is referred to in the memorandum filed herein by the defendant Galloway. As was said, even defendants' authority stands for the proposition that special damages need not be pleaded where printed matter is defamatory.

2. The additional points raised by the defendant Galloway are also without merit. Even the quotations set out in his memorandum bear out the proposition that it is unnecessary to set out the items of damage with more specificity. The Supreme Court settled long ago that words are actionable in themselves "if they are prejudicial in a pecuniary sense to a person in office or to a person engaged for a livelihood in a profession or trade." Pollard v. Lyon, 91 U.S. 225, 23 L.Ed. at 310 (1876). Here it is clear that the words complained of touch the plaintiffs in their means of livelihood as real estate traders. Cf. Marino v. DiMarco, 41 App. D.C. 76, 77 (1913). The law has and must take notice of the fact that to say that a real estate trader circulates 'completely false' reports as to his trading activities necessarily touches him in his trade as it is an attack

upon a necessary part of his trading equipment. See, Jones v. Jones, [1916] 2 A.C. 481, 507.

For the foregoing reasons and for the reasons heretofore advanced in plaintiffs' opposition to the motion to dismiss filed by the corporate defendant, the motion to dismiss should be denied.

Respectfully submitted,

BERNSTEIN, KLEINFELD & ALPER

By /s/Sheldon E. Bernstein
1725 Eye Street, N.W.
Washington 6, D. C.

Attorneys for Plaintiffs

[Certificate of Service]

SHER, OPPENHEIMER & HARRIS
ATTORNEYS AT LAW
1026 WOODWARD BUILDING
WASHINGTON 5, D. C.

September 18, 1963

Honorable Edward A. Tamm
United States District Judge
United States District Court
for the District of Columbia
Washington, D. C.

Re: David Lawrence, et al. v.
Hamilton Properties, Inc., et al.
Civil Action No. 1558-63

Dear Judge Tamm:

I am submitting herewith an Order prepared in accordance with the Clerk's notice of your ruling granting the motions to dismiss in the above case.

Sheldon E. Bernstein, Esq., attorney for the plaintiffs, authorized me to sign his name as having seen the Order and asked that I convey to you

his request that there be added at the end of the Order the words "with leave to amend" or their equivalent.

Respectfully,

/s/ Abraham J. Harris

Encl.
Cc - Sheldon E. Bernstein, Esq.
Thomas D. Quinn , Jr., Esq.

[Filed Sept. 18, 1963]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID LAWRENCE, et al. *Plaintiffs,*	:	Civil Action
v.	:	No. 1558-63
HAMILTON PROPERTIES, INC., et al. *Defendants.*	:	

ORDER

This cause coming on to be heard on the respective motions of defendant Hamilton Properties, Inc. and of the defendant Harry Galloway to dismiss the complaint, and the Court having heard the argument of counsel for each of the said defendants and for the plaintiffs, and being fully advised in the premises, it is hereby

ORDERED that the motions of defendants Hamilton Properties, Inc. and Harry Galloway to dismiss the complaint be and they hereby are granted and the complaint herein is dismissed.

/s/ Edward A. Tamm
Judge

Dated: September 18, 1963

Submitted by:

/s/ Abraham J. Harris
Attorney for Defendant
Hamilton Properties, Inc.

/s/ Thomas D. Quinn, Jr.
Attorney for Defendant
Harry Galloway

Seen:
/s/ Sheldon E. Bernstein
Attorney for Plaintiffs

United States District Court for the District of Columbia

o

DAVID LAWRENCE, et al.
Plaintiffs,
vs.
HAMILTON PROPERTIES, INC., et al.
Defendants.

CIVIL No. 1558-63

NOTICE OF APPEAL

Notice is hereby given this 16th day of October, 1963, that David Lawrence and Albert P. Dicker hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 18th day of September, 1963 in favor of defendants Hamilton Properties, Inc., and Harry Galloway against said plaintiffs David Lawrence and Albert P. Dicker.

/s/ Sheldon E. Bernstein
1725 Eye Street, N. W.
Washington 6, D. C.
Attorney for Plaintiffs.

Notify: Abraham Harris, Esquire
1026 Woodward Building
Washington 5, D.C.
Attorney for Defendant
Hamilton Properties, Inc.
and
Thomas D. Quinn, Jr., Esquire
505 Transportation Building, Washington 6, D. C.
Attorney for Defendant Harry Galloway

BRIEF FOR APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,248

DAVID LAWRENCE and ALBERT P. DICKER,

Appellants,

v.

HAMILTON PROPERTIES, INC.
and HARRY GALLOWAY,

Appellees

Appeal From the United States District Court
for the District of Columbia

HUBERT M. SCHLOSBERG
1407 L Street, N. W.
Washington, D. C.

THOMAS D. QUINN, JR.
800 17th Street, N. W.
Washington, D. C.

Attorneys for Appellees

QUESTIONS PRESENTED

1. Was it defamatory for Appellees to say that Appellants had not bought the Raleigh Hotel?

2. Assuming defamation, did Appellees' oral statement become a libel on their part, rather than a slander, when it was subsequently printed by a wholly independent third party?

3. If Appellees' statement could be shown to be defamatory only by means of facts extraneous to the statement itself, did Appellants meet the requirement of "specifically" stating special damage, by entering only a general plea of special damage?

4. Should Appellants be permitted to amend their complaint after the right to amend has been terminated by dismissal and when (a) the record shows that no motion for amendment was made, (b) no amended complaint was submitted to the trial judge for his consideration and (c) Appellants have given no reason for belief that an amendment would state a cause of action?

INDEX

TABLE OF AUTHORITIES

Cases:

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* Authorities principally relied upon.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,248

DAVID LAWRENCE and ALBERT P. DICKER,

Appellants,

v.

HAMILTON PROPERTIES, INC.
and HARRY GALLOWAY,

Appellees.

Appeal From the United States District Court
for the District of Columbia

BRIEF FOR APPELLEES

COUNTER-STATEMENT OF THE CASE

Appellants have brought this action for defamation because Appellees incorrectly said that Appellants had not bought the Raleigh Hotel (J.A. 1-4). Thereby Appellants contend that they have been held up to "scorn, ridicule, contempt, and disgrace" by real estate dealers (J.A. 4). On this account, Appellants demand $400,000 "actual damage" and $1,000,000 "punitive damages" (J.A. 4). No specification of these damages appears in the Complaint (See J.A. 1-4).

Appellees' statement was made orally to a reporter from the Washington Post (See J.A. 2-3). There is no allegation that Appellees are in any way connected with the Washington Post or exercise any control whatsoever over what is printed in that paper (See J.A. 1-4).

Appellees moved to dismiss the complaint for failure to state

a claim upon which relief can be granted, and for failure to specifically plead special damages as required by Rule 9(g), Fed. Rules Civ. Proc. (J.A. 5-6). The motions were granted over Appellants' objections (J.A. 7, 10).

Appellants made no formal motion to amend, but forwarded to the judge, through a letter from Appellees' counsel, a request that the Order of Dismissal include leave to amend. This request came on the day the Order was to be signed. No explanation was given, or has been given, as to what such an amendment would include or how it would cure the defects of the dismissed complaint (See J.A. 11-12). Leave to amend was not included in the Order (J.A. 12).

SUMMARY OF ARGUMENT

The statement that Appellants did not purchase the Raleigh Hotel is not defamatory. There is no defamation case of record that approaches in insignificance the statement which present Appellants allege has held them up to "scorn, ridicule, contempt, and disgrace."

Appellants plead no special damage. Such a plea is essential except in cases of libel per se. At worst, however, Appellees' statement, which was made orally by Appellee, was slander. Even if libel, it was not libel per se: i.e., facts extraneous to the Appellees' statement must be shown in order to make out a case of defamation. In either event, special damages must be specifically pleaded. The Complaint was therefore properly dismissed for failure specifically to plead special damage.

Appellants failed to move to amend and failed to provide the trial court with any reason to believe that an amendment would cure the defects of the Complaint. An amendment would have served no other purpose than to further harass the Appellees with a wholly frivolous complaint. Appellants' informal and untimely request for leave to amend was properly ignored by the court below.

ARGUMENT

I. Appellee's Statement That Appellant Had Not Bought a Particular Hotel Was Not Defamatory

Appellants' Complaint was properly dismissed because it failed to state a cause of action. To constitute defamation the words must, as Appellants recognize in their Complaint (J.A. 4), "hold them up to scorn, ridicule, contempt and disgrace." Surely this standard, or anything approaching it, is not met by a statement that Appellants did not buy the Raleigh Hotel.

Appellants cite three cases to support their contention of defamation. These cases serve only to show how far from the extreme outer limits of defamation the present complaint falls.

In Marino v. DiMarco, 41 App. D.C. 76 (1913), the defamation consisted of charges that a fruit seller sold rotted food. This Court took notice of the unlawfulness of selling food "consisting in whole or in part of filthy, decomposed, or putrid animal or vegetable substance," and of the obvious and inevitable injury to the food seller's business because of such a statement. The closest analogy in the real estate business would probably be a charge of selling buildings that violate the law by being unsanitary or otherwise unsafe for human habitation. Nothing remotely like that has happened here.

Appellant also cites Pollard v. Lyon, 91 U.S. 225 (1875). There the Court wrestled with the problem of whether charges of fornication on the part of a woman were words "in themselves actionable." It held that even in such a case there would be a cause of action only on a showing of special damage. Appellants, in citing Pollard, suggest no analogy between the real estate business and the defamation complained of in that case, and Appellees are at a loss to find one.

Appellants' final case to support the contention of defamation is Peck v. Tribune Co., 214 U.S. 185 (1909). That case involved a lady who

was a professional nurse and whose picture was used without her permission in an advertisement. This in itself appears to have provided a basis for her action in tort. See Peck v. Tribune Co., 214 U.S. at p. 190 (final paragraph). In addition the advertisement quoted her as saying that she had devoted "years of constant use" to a particular whiskey, drinking it herself (she was a total abstainer), and dosing her patients with it. It is certainly doubtful at best that it would be defamatory to say of a real estate dealer in 1964 that he drinks whiskey. At any rate, the case of a lady nurse of 55 years ago is obviously different. And, of course, more different still is the present case, for which Appellants cite Peck as authority.

Finally, Appellants have ignored the "sole occasion" doctrine in the law of defamation as it relates to a profession or trade. To say that a lawyer or doctor is an incompetent, for example, is clearly defamatory. However, to say that a lawyer or doctor, on a sole occasion, handled a single case badly or treated a particular patient unskillfully, does not necessarily impugn his professional ability generally, and is therefore not defamatory, at least in the absence of special damages. Foot v. Brown, 8 Johns. 64 (N.Y., 1811) (lawyer); Camp v. Martin, 23 Conn. 86 (1854) (doctor). Similarly, in the present case the only defamation alleged relates to a "sole occasion" — a single business transaction that Appellants had made and that Appellees said had not been made. There is no necessary derogation of business character in general (if at all), and therefore there can be no defamation in the absence of special damage. Foot v. Brown, supra; Camp v. Martin, supra.

II. Appellants' Failure To Plead Special Damages With Any Reasonable Degree of Particularity Was Fatal to Their Complaint, Because (A) Appellees' Statement Was Oral, and Therefore Not a Libel, and (B) Appellees' Statement, Even if a Libel, Was Not a Libel Per Se

A. Appellees' Statement Was Oral, and Therefore Not a Libel.

There is no dispute as to the facts in this regard. As shown in the newspaper article relied upon in Appellants' Complaint, Appellee Galloway "said" that reports of a purchase by Appellants was false (J.A. 3). Obviously, he spoke with a reporter for the Washington Post (See J.A. 2-3). Galloway himself is alleged to have written nothing (J.A. 2-3). Therefore, if there be any defamation in this case on the part of Appellees, it is at most slander.

The difference in treatment of libel and slander, and the reason for this difference, is well settled. As quoted with approval in Appellants' brief at page 8, Plucknett records that, "The distinction between spoken and written defamation . . . became vital, and has proved to be permanent." Plucknett, A Concise History of the Common Law 496-497 (5th ed., 1956). As Mr. Justice Clifford carefully pointed out, "It must be borne in mind that there is a marked distinction between slander and libel, and that many things are actionable when written or printed and published which would not be actionable if merely spoken, without averring and proving special damage." Pollard v. Lyon, 91 U.S. at 228.[1]

The established historical reason for this difference is also quoted from Plucknett by Appellants with approval: " . . . Many defamatory words spoken in heat could be safely ignored, but if they were written, then the obvious presence of malice would make them actionable . . . without special damage." Plucknett, loc. cit. The same thought is found

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[1] Mr. Justice Clifford did not say, however, that "all" things are actionable when written, without an averment of special damage. See Part III, infra.

in modern cases, e.g.: " . . . a writing provides an opportunity to reflect, not afforded when the accusation is spoken." Mishkin v. Roreck, 115 N.Y.S. 2d 269, 273 (1952). In the present case, of course, Galloway's words were communicated by him orally. The fact that a third party printed them does not make Appellees guilty of libel, whatever may be the tort by the third party. See Osborn v. Thomas Boulter & Son [1930], 2 K.B. 226; Rest. Torts §578, Comment d (see n. 3 below).

Nor can it be said with accuracy that Appellees "caused" a defamation to be printed. Unlike the case of an employer's dictation of a letter to a secretary, who then types the letter for the employer's signature,[2] Appellees had no control over the Washington Post. The newspaper is neither their employee, nor their agent, nor their servant. Much less is the Washington Post acting within the scope of Appellee's employment, as required by Rest. Agency 2d, §247. Moreover, the reporter might not have taken the statement down; he might not have written it into his article; and his editor might have cut it before publication. The critical point, however, is that Appellees merely spoke. They themselves wrote nothing about which Appellants complain.[3]

Accordingly, Appellants' entire argument in Part II of their brief

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[2] Compare: "It may be that the only communication between Mr. Boulter and the typist was the bare dictation of the letter. I agree with the passage in Salmond on Torts, 7th ed., p. 530 . . .: ' . . . a defamatory statement may be published by being dictated to a clerk, shorthand writer, or other reporter who reduces it to writing, but it is submitted in this case also that such a publication amounts to slander only. There are dicta to the contrary, indeed, in certain cases in which dictation to a clerk is said to be the publication of a libel to the clerk; but it is difficult to see how A can publish to B a document which is written by B himself.'" Osborn v. Thomas Boulter & Son [1930], 2 K.B. 226, 237 (Lord Justice Slesser).

[3] If one party publishes a slander, which is then republished by another in writing, the second publication is a libel, but the first remains a slander. Thus, "the republisher [in writing] may be liable even though the originator of the defamatory matter [orally] is not liable because the publication in slanderous form was not of such a character to be actionable per se." Rest. Torts §578, Comment d.

falls with the fallacious major premise of that argument that Appellees printed a libel. As Appellants themselves concede, " . . . the requirement of pleading special damages remains applicable to slander . . . " (Brief for Appellants, p. 7). Since Appellants failed to plead special damage, their Complaint was properly dismissed.

B. Appellees' Statement, Even if a Libel, Was Not a Libel Per Se.

A real estate dealer, at an outing attended by 600 other real estate dealers, was called, in the presence of others, a "lousy crook." It was held that this was not slander per se, and that special damages must be pleaded. Mishkin v. Roreck, 115 N.Y.S. 2d 269 (1952). This was a case of slander, not libel, but it serves to place the present case in rational perspective. To call a real estate dealer a "lousy crook" is but a "borderline slander situation." Ibid., at 273.[4] It cannot reasonably be said that a statement that a real estate man did not buy a particular hotel is substantially more serious, simply because in writing.

Nor is there any dearth of cases, far more substantial than the present one, in which written defamation has been held to require special damages because not libelous per se. In Schoen v. Washington Post, 246 F.2d 670, 100 App. D.C. 389 (1957), the issue was not whether special damage had to be pleaded, but whether it had been pleaded with sufficient particularity. (If special damage need not have been pleaded at all, the Court, of course, could have avoided entirely the issue of sufficiency.) The defamation in Schoen related to a reported vice squad raid on plaintiff's dance studio. The complaint included the specific amount of gross income lost because of the defamation, providing comparative annual income figures. See also Erick Bowman Remedy Co. v. Jensen Salsbery Laboratories, 17 F.2d 255, 261 (8 Cir., 1926), quoted with approval in Schoen at p. 391, n. 3, and also in Fowler v. Curtis Publishing Co., 182 F.2d 377, 86 App. D.C. 349, 351 (1950). In short, this Court,

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[4] See also Friedlander v. Rapley, 38 App. D.C. 208 (1912), which was overruled on another issue in White v. Central Dispensary, 69 App. D.C. 122, F.2d 355 (1938), but cited with approval in Washington Annapolis Hotel Co. v. Riddle, 171 F.2d 732, 83 App. D.C. 292 (1947).

and numerous others, have read the simple, direct language of Rule 9 (g) to mean just what it says: "When items of special damage are claimed, they shall be specifically stated."

The only case on which Appellants rely regarding libel per se, not previously discussed herein, is Meyerson v. Hurlbut, 68 App. D.C. 360, 98 F.2d 232, cert. den., 305 U.S. 610 (1938). There this Court found slander per se in statements that plaintiff had been cutting prices,[5] that he was selling below cost to hold onto business, that some jobbers had discontinued his credit, and that others had refused to deal with him altogether. Meyerson would be analogous here only if the sole statement complained of in that case had been that plaintiff had not made a particular purchase, which he had in fact made, or perhaps that he had made a single sale at below cost.

Cases from other courts supporting the requirement of special damages in the absence of libel per se, are so numerous that Appellees' only problem is one of selection. In McBride v. Crowell-Collier Pub. Co., 196 F.2d 187 (5 Cir., 1952), defendant wrote that plaintiff's company was controlled by "hoodlums" and "former followers of Al Capone." The court found that there is no substantial difference among the states to the effect that "if false accusations are not libelous in themselves [per se], but require extrinsic facts to establish the libel, there must be allegation and proof of special damage." Ibid. at 189-190. The libel in McBride was held to be per quod and not per se.[6]

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[5] The Court noted that the practice of price-cutting has been condemned as unfair competition, destructive, harmful, and contrary to public policy as expressed in a number of federal and state statutes.

[6] See also: Towles v. Travelers Ins. Co., 282 Ky. 147, 137 S.W. 2d 1110 (1940) (not libel per se to write that insurance company had been suspended); Chase v. New Mexico Pub. Co., 53 N.M. 145, 203 P.2d 594 (1949) (not libel per se to imply that plaintiff had obtained money illegally while a revenue commissioner); Dalton v. Woodward, 280 N.W. 215 (Neb., 1938) (not libel per se to write that plaintiff was "full of envy, jealousy, vicious hate, greed, intolerance, [and] prejudice," and to imply that he was an escaped convict); Rowan v. Gazette Printing Co., 239 P. 1035 (Mont., 1925) ("per se" and "per quod" defined).

Only by a holding far out of line with all precedent, therefore, can the statement in the present case be found to be libel per se. It follows that the Complaint was properly dismissed for failure to set forth special damages.

III. Appellants Were Not Entitled To Amend Their Complaint Because (A) the Right To Amend Has Been Terminated by Dismissal; (B) No Amended Complaint Was Submitted to the Trial Court for His Consideration; and (C) Appellants Have Failed To Show, Either in the Record Below or in Their Brief, How Any Amendment Would Serve To Cure Their Defective Complaint

Appellants cite two cases for the proposition that the "absolute" right to amend a Complaint is terminated by a judgment of dismissal. They are correct in their reading of both cases; their right to amend has been terminated. Cassell v. Michaux, 99 App. D.C. 375, 240 F.2d 406 (1956); United States v. Newbury Mfg. Co., 123 F.2d 453 (1 Cir., 1941).

Nevertheless, they complain that "it was error for the Court below to refuse to give plaintiffs leave to amend their complaint" (Brief for Appellant, p. 9). The record in this case discloses but a single reference to a request for amendment. On the very day that the Order of Dismissal was to be signed, counsel for Appellants, by a message forwarded to the Court in a letter from Appellees' counsel, asked that the Order include the words "with leave to amend" (J.A. 11-12). This falls far short of a timely submission to the trial court of an amended complaint, as was done in Cassell v. Michaux, supra; cf. United States v. Newbury Mfg. Co., supra.

Moreover, a litigant surely has some obligation to present the trial court with some reasonable basis for supposing that leave to amend will result in the assertion of a cause of action. "While we recognize that under Rule 15 . . . the right to amend should be freely extended . . .,

nevertheless this right should not be extended to a litigant when the amendment asserts no claim nor defense cognizable by the Court. . . . See also Laughlin v. Garnett [78 App. D.C. 194, 138 F.2d 931, cert. den., 322 U.S. 738 (1944)]." Louisville Trust Co. v. Smith, 192 F. Supp. 396, 407 (W.D. Ky., 1961).

Nowhere in the record from the Court below or in their brief before this Court have Appellants given the faintest intimation of what amendment they proposed to make. Nowhere have Appellants shown that an amendment in the court below or a reversal by this Court would produce any consequence other than further harassment of Appellees on a wholly frivolous claim. Leave to amend — if indeed it was timely and properly requested — was therefore properly denied.

CONCLUSION

For the foregoing reasons, Appellees respectfully submit that the Order and Judgment of the District Court should be affirmed.

Respectfully submitted,

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